



U.S. Department of Justice

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ELECTRONIC CASE FILING

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Re: *United States v. Jim Baugh and David Harville*
1:20-cr-10263-PBS/MBB

Dear Counsel:

Thank you for Mr. Fick's June 29, 2021 letter requesting additional discovery. The government responds as follows.

The government is aware of its responsibilities and obligations under Fed. R. Crim. P. 16 ("Rule 16"), this District's Local Rules, and Brady. Many of your requests exceed the government's obligations as established by those rules and constitutional mandates. To the extent, as set forth below, that the government is agreeing to produce certain materials that exceed those requirements, the government is not waiving its rights to object to overbroad requests or to withhold information that is not covered by them. *See, e.g.*, Fed. R. Crim. P. 16(a)(2) (government work product) or the Jencks Act.

Request 1. Documents concerning or comprising any investigation of the "Fidomaster" Twitter account, including without limitation efforts to identify the person or persons in control of that account.

The government has produced substantial records about eBay and the coconspirators' attempts to identify Fidomaster and to respond to the contents of his/her online activities. It is not aware of any other documents responsive to this Request that it is obligated to produce at this

time.

To the extent Request 1 seeks information about the NPD and FBI's investigation of the Fidomaster's identity and activities, produced herewith are documents Bates-stamped USA_BH_0048135 through USA_BH_0048152. Beyond these documents, the government objects that such documents are not material to preparing the defense, currently discoverable under the Local Rules, or *Brady* materials. In any event, the government is not aware at this time of any other documents responsive to this Request (as interpreted in this paragraph).

Request 2. Documents concerning or comprising any investigation of Victim 1 or Victim 2.

All of the allegations in the Indictment and all of the discovery produced to date concern in some way an investigation involving Victim 1 and Victim 2.

To the extent Request 2 calls for documents concerning any investigation of the Victims themselves, the government has produced substantial records regarding the defendants and their coconspirators' investigation of the Victims prior to the harassment and intimidation campaign (e.g., USA_BH_0000828 to USA_BH_0000867). The government is not aware of any other documents responsive to this Request (as interpreted in this paragraph) that it is obligated to produce at this time.

To the extent Request 2 calls for documents concerning an NPD or FBI investigation of the Victims for misconduct, the government objects. In any event, the government is not aware at this time of any documents responsive to this Request (as interpreted in this paragraph).

Request 3. Documents concerning or comprising any investigation of communications or other links between or among Victim 1 or Victim 2, on one hand, and the person(s) in control of the "Fidomaster" Twitter account, on the other hand.

The government has produced substantial records about eBay and the coconspirators' investigations of links between the Victims and Fidomaster and their response to the content of Fidomaster's online activities. The government is not aware of any other documents responsive to this Request (as interpreted in this paragraph) that it is obligated to produce at this time.

To the extent Request 3 seeks information regarding any NPD or FBI investigation into links between the Victims and Fidomaster (and not the defendants' and their coconspirators' investigation), the government objects. In any event, the government is not aware at this time of any other documents responsive to this Request (as interpreted in this paragraph).

Request 4. Documents concerning or comprising any investigation of communications or other links between or among Victim 1 or Victim 2, on one hand, and Elliott Management, its agents, or employees, on the other hand.

The government has produced records about eBay and the coconspirators' investigation

of connections between the Victims and Elliott Management. The government is not aware of any other documents responsive to this Request (as interpreted in this paragraph) that it is obligated to produce at this time.

To the extent Request 4 seeks information regarding any NPD or FBI investigation into connections between the Victims and Elliott Management (and not the defendants and their coconspirators' investigation into such links), the government objects. In any event, the government is not aware at this time of any other documents responsive to this Request (as interpreted in this paragraph).

Request 5. Documents concerning or comprising any investigation of criminal conduct by Executive 1 (Devin Wenig), Executive 2 (Steve Wymer), and/or any other eBay executives.

The government assumes this request seeks information regarding the NPD and FBI's investigation into criminal conduct relating to the harassment and intimidation of the Victims and the obstruction of the investigation that followed, and not an investigation into other unspecified criminal conduct.

The government has produced substantial records regarding Executive 1, Executive 2, and other eBay executives whose conduct was within the scope of the investigation, including the executives' communications with Mr. Baugh and with each other. The government is not aware of any other such documents that it is obligated to produce at this time. Any testifying witness' statements regarding these executives will be produced as Jencks materials.

To the extent Request 5 seeks documents concerning the government's decision to investigate (or not to investigate) or to charge (or not to charge) others with the conduct alleged in the Indictment, the government objects. Whether or not other others were investigated or charged is neither relevant nor admissible in this case, not material to preparing the defense, and not otherwise discoverable.

Request 6. Documents sufficient to identify activities performed by Mr. Baugh authorized by or in support of U.S. government intelligence or law enforcement agencies or operations from 2014 to 2018.

Request 7. Documents concerning or comprising any agreements between Mr. Baugh and U.S. government agencies relating to the activities referenced in the previous request.

Request 8. Documents concerning or comprising written instructions or warnings provided to Mr. Baugh relating to the activities referenced in the previous two requests.

Without confirming or denying the existence of any of the described activities, agreements, instructions, or warnings for the period between 2014 and 2018, or any documents concerning those categories, the government would decline to produce such records. The period

described in the requests is irrelevant because it predates the existence of the conspiracy alleged in the Indictment. To the extent you seek information in the government's possession that, assuming it existed, would tend to diminish the degree of the defendants' culpability, Local Rule 116.2(b)(4) requires only that a written summary of any information be provided before the earlier of a plea or the defendant's submission of objections to a Presentence Investigation Report.

Request 9. Documents concerning or comprising any communications between the Natick PD and the FBI.

The government assumes Request 9 is directed to communications related to the investigation of the harassment and intimidation of Victims 1 and 2 or the obstruction of any investigation into that conduct, and not NPD-FBI communications generally. The government produces herewith documents Bates-stamped USA_BH_0048153 through USA_BH_0048233, consisting of NPD-FBI communications for the period between August and October 2019, all regarding the investigation into the August 2019 harassment of the Victims. The government has not produced later communications that do not concern the 2019 investigation; transmittal, scheduling, and similar communications; and witness statements that the government expects to produce with *Jencks* materials. The government is not aware of any other documents responsive to this Request (as interpreted in this paragraph) that it is obligated to produce at this time.

Request 10. Documents concerning or comprising any communications between the Natick PD and eBay.

The government assumes Request 10 is directed to communications between the NPD and eBay related to the harassment and intimidation of the Victims and the investigation that followed.

The government's June 22, 2021 production identified two such communications: one from NPD Detective John Haswell on August 20, 2019 (e.g., USA-BH-0000275 and 0000276) and a second from NPD Detective Jason Sutherland on August 21, 2019 (e.g., USA-BH-0000305).

The government separately produced text and email communications between Detective Sutherland and Brian Gilbert (then an eBay employee) at USA_BH_0035342 through USA_BH_0035350.

The government produces herewith (at USA_BH_0048234 through USA_BH_0048235) one additional email thread from August 2019, between Detective Sutherland and Amir Vonsover, an in-house lawyer at eBay.

The government is not aware of any other documents responsive to this Request that it is obligated to produce at this time.

Request 11. Documents concerning or comprising the internal investigation by Morgan Lewis and/or other outside counsel of the events at issue in the indictment.

Request 12. Documents concerning or comprising the internal investigation by eBay of the events at issue in the indictment.

Request 13. Please clarify whether the government is withholding materials responsive to the previous three requests, and/or materials responsive to Mr. Harville's request no. 1 for documents provided to the government by eBay, on the grounds that they constitute witness statements, or on any other basis.

As to Requests 11 through 13, please see the government's June 22, 2021 response to Mr. Harville's Request Nos. 1 and 4. The government is withholding witness statements that may constitute *Jencks* material for testifying witnesses that is not otherwise discoverable. The government has not produced communications from outside counsel from eBay regarding scheduling, transmittals, and similar matters.

Request 14. The files listed in attachment 1 are "empty" (they consist of a single kilobyte with no content). Please provide replacements with content.

There is no additional content to produce. The files listed in attachment 1 to your letter are each empty, system or "ghost" files that Apple and Windows operating systems create when a user zips or opens another file. The government inadvertently included them in its production. The file Bates-stamped USA_BH_0035269, for example, is a system file that corresponds to the content of the .jpg file Bates-stamped USA_BH_0035291, the photograph of a mailing label addressed to Victim 1. Similarly, the system file Bates-stamped USA_BH_0035940 relates to the search warrant affidavit produced at USA_BH_0035943 through USA_BH_0035984.

Request 15. Documents concerning or comprising the allegations contained in the complaint and/or warrant affidavits as set forth in attachment 2.

- "Also on August 10, 2019, Victim 2 received an e-mail reporting that an online order for a "Preserved Fetal Pig" had been ordered to be sent to the Victims' House"

The email and its attachment—the invoice for the online order of the "Preserved Fetal Pig" are produced herewith at USA_BH_0048236 through USA_BH_0048237.

- "On August 13, 2019, Victim 2 received a voicemail message in response to his supposedly having expressed interest in opening an Adam & Eve sex toys franchise."

The email message and voicemail are produced herewith as USA_BH_0048238 through USA_BH_0048239.

- "On August 15, 2019, pornography arrived at the homes two of Victim

2's neighbors addressed to his name. On August 20, 2019, more pornography was delivered over Victim 2's name to a third neighbor.

The packages were addressed under Victim 2's name to the homes numbered 9, 10, and 15 on the Victims' street. The government will produce copies of the packaging.

- On August 22, 2019, NPD officers met with two eBay Global Security employees, Brian Gilbert and Scott Fitzgerald.

Please see USA_BH_0035254 through USA_BH_0035260, previously produced.

- According to Victim 1 and Victim 2, revenue from eCommerceBytes was an important source of income for [them].

The government will produce the Victims' statements with Jencks' materials should they testify at trial.

- The government has interviewed several current and former eBay employees in connection with its investigation.

The government is not obligated to identify the witnesses it interviewed during the investigation or their statements. The government will identify its trial witnesses consistent with the Local Rules and any scheduling order the Court issues, and will provide trial witness' Jencks materials consistent with its obligations.

- On August 8, 2019, Zea paid cash for a prepaid phone and a laptop computer at a Best Buy in San Jose, California.

Veronica Zea's expense report was previously produced at USA_BH_0000996. The associated Best Buy receipt was previously produced at USA_BH_0000997 and USA_BH_0000998, although the purchaser may have been either Stephanie Stockwell or Veronica Zea.

- While in Boston, Harville bought items from a local hardware store, what I believe, based on my training and experience as an investigator to be a "break in" kit. According to the itemized receipt from the hardware store...

The itemized receipt was previously produced at USA_BH_0047787. Investigators first obtained it voluntarily from Charles Street Supply on October 2, 2019. eBay also produced a spreadsheet indicating Harville's use of his eBay credit card for this expense, at line 857 of the previously produced Excel file Bates-stamped USA_BH_0000681. A photograph of the same receipt, file name IMG_8732, was later found in Harville's variantonellc@gmail.com iCloud account, which was produced to you within the report at USA_BH_0045640.

- August 22, 2019, according to participants in the meeting, Gilbert claimed that eBay had no role in the harassment of ...

We have previously produced the NPD report concerning this meeting at USA_BH_0035254 through USA_BH_0035260.

- On or about August 26, 2019, Popp, Gilbert, Baugh, Stockwell, Zea, and others gathered in an eBay conference room. According to more than one participant...

We have previously produced eBay badge access records for the date and time of this meeting at USA_BH_00002930 through USA_BH_0002970 and USA_BH_0002982 and USA_BH_00002983. Witness statements for testifying participants in the meeting will be provided in connection with the government's Jencks obligations.

- Gilbert rented a black Ford Explorer similar to one that appears in surveillance video from the Victims' home security system that day. In the video, the driver of the...

The video is previously produced to Mr. Baugh at USA_BH_0045585 and USA_BH_0045586, and to Mr. Harville at USA_BH_45558 and USA_BH_0045559. It appears that the date and time stamp on the recording in question is inaccurate.

- Records obtained from eBay and Red Hat, the sponsor of the conference, indicate that HARVILLE and Zea attempted to register for the DevConf conference on or about August 14, 2019, but also that none of the three ever attended the 2020...

The government previously produced Red Hat/Eventbrite records concerning attendance at the conference at USA_BH_0034282 through USA_BH_0034284. The government previously produced records concerning Mr. Harville's alteration of documents to suggest that he signed up on the conference waitlist before August 14, 2019 at USA_BH_0048071.

Request 16. The search warrant(s), subpoena(s), request(s), or consent(s) pursuant to which the materials listed in attachment 3 were provided to the government.

All of the materials listed in attachment 3 (except the final two) were obtained through a sitting grand jury's issuance of a subpoena. The government is not aware of authority requiring the production of the subpoenas themselves, which are grand jury materials within the meaning of Fed. R. Crim. P. 6(e), and respectfully declines to produce them.

The government obtained the materials at USA_BH_0035339 through USA_BH_0035341 through a Mutual Legal Assistance Treaty ("MLAT") request to Switzerland. The government is not aware of any authority requiring it to produce the MLAT request itself. Please let me know the grounds on which you believe them to be discoverable.

The contents of the iCloud account cexg.llc@icloud.com (USA_BH_0045579) were obtained by search warrant. The government previously produced the copy of the affidavit in support of that search warrant at USA_BH_0036208 through USA_BH_0036275.

Request 17. Specific requests related to the Bates ranges listed in attachment 4.

- USA_BH_0035351 – reports concerning origin/authenticity of this document

The government does not currently intend to offer this receipt its case-in-chief, but it would authenticate and admit it through the testimony of a representative of the merchant that provided it as a business record in response to a grand jury subpoena.

- USA_BH_0035421 – native copy of email and image

The government produces herewith native copies of the email and image as USA_BH_0048240 through USA_BH_0048242.

- USA_BH_0035422 through USA_BH_0035426 – native copy of image[s]

The government produced native copies (.jpg) of these images. The contents and packaging depicted in them are available for your inspection at a mutually convenient time.

- USA_BH_0035564 through USA_BH_0035566 – Photos of packages and copy of thumb drive

The government produced photos of the contents of the packages at USA_BH_0035422 through USA_BH_0035426. As noted above, the contents and packaging depicted in them are available for your inspection at a mutually convenient time.

The government has obtained the thumb drive that the Victims gave to the Natick Police Department. It will provide native copies of any previously produced or otherwise discoverable materials. (That production would not include, for example, any otherwise non-discoverable *Jencks* materials). At any point after which the entire contents of the thumb drive have been produced, the government will make the original available for you to inspect.

- USA_BH_0035840 through USA_BH_0035848 – reports concerning origin and authenticity

The government will authenticate the images between USA_BH_0035840 and USA_BH_0035845 through the person that created them.

The government will authenticate the images at USA_BH_0035846 through USA_BH_0035848 through a competent witness.

- USA_BH_0045509 USA_BH_0045515 - Results of search of Victims' server; images/extractions of Cooke and Wymer phones.

The government previously produced the access logs that it obtained from the Victims'

server at USA_BH_0045585. The government previously produced eBay's extractions of the Cooke and Wymer iPhones at USA_BH_0045575 (Cooke) and USA_BH_0045582 and USA_BH_0045583 (Wymer), respectively.

Request 18. With regard to FBI-302s and other documents which may contain witness statements that qualify as Jencks material, I would ask that you reconsider your declination to produce those materials at this time, set forth in your June 22, 2021, response to the discovery letter from Mr. Harville's counsel.

The government respectfully declines to produce FBI 302s and other documents containing Jencks material at this time.

The government is aware of its continuing discovery obligations. It also requests reciprocal discovery under Rule 16 and the Local Rules.

Please contact the undersigned Assistant United States Attorney at (617) 748-3230 if you wish to discuss this response these responses.

Very truly yours,

NATHANIEL R. MENDELL
United States Attorney

By: /s/ Seth B. Kosto
SETH B. KOSTO
Assistant U.S. Attorney

Enclosures under separate cover